1893

Punitory Damages in Civil Actions

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A Thesis

By

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Preface.

The question of punitory damages has furnished a subject of much controversy. Some of the ablest of modern jurists, looking at it, from different standpoints; apparently at least, have come to directly opposite conclusions as to its nature and scope its origin, and as to whether its presence in actions of civil nature can be justified as based upon sound reasoning, and the best principles of justice.

A large part of the seemingly wide difference of opinion expressed in the numerous decisions of this and the last century, is, I believe directly owing to a lack of clear and concise understanding of the true significance of the term, I have therefore, as far as the

scope of so short a treatise will allow, devoted considerable time to the discussion of the nature & meaning of the doctrine as applied in practice, starting as a basis from the liberal meaning of the term, "punitory damages".

Much discussion has also taken place as to the origin of the doctrine, whether present in the common law, or a departure therefrom, and as to whether it can be based upon authority laid down in the early cases cited by subsequent writers, or is based upon mere careless remarks of judges, or at best "obiter dicta". After making a careful review of the authorities upon the subject, including a critical review of the original cases from an unprejudiced standpoint I have attempted a statement, which I hope will be found satisfactory of what the doctrine originally was.

From the basis of the doctrine as originally advanced, I attempt to trace its development, including, as I firmly believe, many instances in which the doctrine has been misunderstood and misapplied.

Added to this, and perhaps rightly discussed under the head of development, has been placed a review of the discussions as to the justification of the doctrine.

Following this, and in logical conclusion have been placed some general principles and inferences, which are respectfully submitted, as based upon the philosophy and general history of the doctrine, together and in accordance with logic and justice.

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Punitory Damages.

Chapter. I. Nature.

(a.) Definition.

In approaching a subject of this kind, it is perhaps best at first, to get a clear and concise definition of just what we are to consider. The terms vindictive, punitive, punitory, exemplary etc. therefore are taken as having substantially the same meaning.

The term "punish" is from the "latin punire, punitum, akin to poena," meaning "to repay a fault, crime etc. with pain or loss."

The terms punitory, punitive, mean, "tending to punishment," or "pertaining to punishment," that is, of the nature of punishment.

"Damage" comes from the latin damnum, meaning injury or harm etc., and from demo, to take away. Thus, taken in its

literal sense, it has the meaning of love, and when given as a remedy in law, means a "compensation, recompence or satisfaction to a party, for a wrong or injury actually done to him by another."

The literal definition of the compound term, punitory damages therefore, must be, a certain sum, which shall be of the nature of a punishment, and at the same time a compensation. That is to say, the term punitory damages has a double signification. It cannot apply solely and purely to either punishment or compensation, but must apply to both, if used in accordance with its true signification. Say for a moment, that a certain sum called punitory damages shall be assessed a defendant to a civil action, solely for the purpose of punishing him. If the said

amount is solely for the purpose of punishing the man, it should never be paid to the plaintiff of said action, but should rather be given to some other person, or placed in the public treasury. Should this be done, where is the signification of the term damages. Surely there is no excuse for calling said amount punitory damages for the sake of punishment only, let us apply them solely for the sake of compensation to the person injured.

The same absurd predicament presents itself, for where is the signification of the term, punitory. Surely and without dispute, the common sense definition, the literal meaning of the term punitory damages, is that it has a double signification, that of compensation, as well as punishment

(5.) Definition of Text Writers.

The above conclusion as to the significance of the term is the one generally reached by writers of authority. Many however, whether from some inherent inability to understand the english language or from the numerous instances in which the doctrine has been misapplied, have professed to reach an entirely different conclusion. Let us first examine some of those who reach correct definitions.

Rapalje in his Law Dictionary divides damages into the following heads:-

Liquidated,
Nominal,
Vindictive.

Punitory damages are given in certain civil actions for personal injury, as "damages given not merely as pecuniary

compensation for the loss actually sustained by the plaintiff, but likewise, as a kind of punishment to the defendant, with a view of preventing similar wrongs in the future, as in actions for malicious injury, fraud, seduction, oppressions, continuing nuisances."

He cites. Browne Com. Law. p. 855, & 2 Smith. Lead. Cases. 549.

Bouvier's Dictionary gives substantially the same classification, and exactly the same definition of punitory damages.

With regard to vindictive damages, Blacke's Dictionary divides the general subject of damages into, compensatory and punitory, the latter of which is thus defined.

"When a greater sum is given, than amounts to mere compensation, in order to punish the defendant for violent outrage, or other circumstances of aggravation

attending the transaction." The term "mere compensation" should be emphasized, for they have the meaning of compensation only. That is, the sum assessed shall not only be a compensation, but a punishment as well, and is hence, called punitory.

In Winfield's "Adjudged Words and Phrases," two cases are given by way of definition.

1st Defines punitory damages as "damages by way of punishment for the commission of a wrong or tort wilfully. (Bates v Davis 76 Ills. 223.") Now such a definition is capable of misconstruction by the careless reader, but careful examination makes its meaning plain. It is only by substituting the word "damages" with "sum" or its equivalent, that said definition can be construed as meaning an amount used solely

for the sake of punishment. As it stands, it certainly means, a sum need for the double purpose of punishment and compensation. 2 Vol. In Fridenhart v. Edmundson 36 Mo. 288, a clearer definition is found. "Such damages as would be a good round compensation, and an adequate recompense for the injury sustained, and such as would serve for a wholesome example to others in like cases."

So much for the literal definition of the term, as laid down by text writers.

I have laid especial stress upon the point, because of the seeming confusion as to the meaning of the term shown by some writers.

Thus as will be seen later Mr. Greenleaf in his work on "Evidence" argues at length against the doctrine of punitive

damages upon the absurd assumption that it was applied solely and purely for the sake of actual punishment.

This erroneous assumption has also been taken in a celebrated New Hampshire case by the learned Judge Foster. (Fay v. Parker 53 N. H. 342.) in which he discusses at length upon this mistaken idea.

I think it is safe to say that the principal authority in this country, against the doctrine is based upon like grounds.

While it is true, the doctrine in some extreme cases has been so misconstrued, the fact that some people fail to understand the primary application of the english language is no argument that a doctrine founded upon sound principles should be repudeated.

Having become acquainted with the

primary meanings of terms, let us look for a moment at doctrine and its application, as also seen in authorities.

In general, it may be said that damages are confined to compensation only, when the motives of the wrongdoer are not taken in consideration in estimating them. This would be the case in all actions ex contractu. In tort actions however, or actions ex delicto, the motive of the defendant often plays an important part in estimating the wrong for which damages are given. It will be readily seen after a moments thought, that so far as the motive of the wrongdoer is taken in consideration in awarding damages, said amount awarded must be of punitory nature, as well as compensation to the person injured, and where wrongful injury

has been increased by the said motive of the offender. Hence the term punitory damages.

Brown in "Commentaries of the Common Law" thus states the doctrine.

"While in general, motive is not properly cognizable in actions ex contracto, the law makes a wide distinction between contract, and tort actions as to the measure of compensation to be awarded to the plaintiff. In tort actions the jury is at liberty to take full consideration of the intentions (motive) of the defendant in committing his wrong, thus to some extent, allowing the damages to be a medium of punishment, as well as compensation. Breach of promise to marry forms the one exception to rule for contract actions. Smith v. Woodfine 1. C. B. N. S. 660. Berry v. da Costa L. R. 1. C. P.

331 & 333.

It seems just that motive should be taken account of in actions ex delicto. because, 1st, it is this in some instances that constitutes the cause of action, and the damages: 2nd it is peculiarly a question for the jury. and 3rd intention must be discovered in order to have a right of action in some instances, and this must be done by the jury.

See Com. on Com. Law pp. 85-2-760 and Murest v Harvey 5 Taunt 442, Price v Severn 7 Bing. 316, James v Campbell 5 Car. etc. 372, and Bell v Midland R.C. 10. C. B. N. S. 308.

Indemaur in "Principles of Common Law" pp. 358-9, lays down substantially the same distinction, and cites, Buckle v Money 2 Wils 205. Fabrigas v Mostyn 2 W. Bl. 929 and Emblem v Meyers 80 L. J. (C. P.) 273.

Smith in "Manual of Common Law", star page 378, thus lays down the doctrine, "in some cases, as in the case of wilful torts, especially if accompanied with insolent expressions, damages" (compensation) "may be given which are regarded as penal."

Such damages are termed exemplary or vindictive", and cites, Broom as authority, also "Ad. Torts p. 178. Mayne 1214 Rose 594" as additional authorities.

Walpole's "Rubric Common Law" p. 289 upholds substantially the same doctrine.

Mayne's "Damages" p. 87 draws a little finer distinction, saying, "damages, in actions, in contracts, and in torts against the property where there is no aggravation amount to compensation merely; but in torts or injuries to the person, character or feelings, and the facts disclose fraud,

malice, violence, cruelty, or the like, they operate as a punishment" (as well as compensation) "for the benefit of the community, and a restraint to the transgressor."

That is, the size or amount of the damages or compensation, so awarded shall act as a punishment.

Having seen the general principles of the doctrine as laid down by text writers, let us examine a few of the cases in which the nature of doctrine has been discussed to see whether said principles are supported by the weight of judicial decisions.

(C.) Application in Cases.

The earlier cases upon the subject will be left to the consideration of the origin of the doctrine. In general, however, it may be said, the principles laid down above are supported in every case,

In McNamara v King 7 Ills. 432 in which a man was tried for assault and battery, the following clear and concise doctrine was laid down. "In this class of cases the jury may give exemplary damages, not only to compensate the plaintiff, but to punish the defendant." Surely there can be no mistake as to the meaning of this language.

But the doctrine is still clearer in T. D. v G. R. R. Co. reported in 15 B. M. 268. This was a Tennessee case and it was expressly held that while punitory damages could be given for both compensation and punishment, it could never be awarded for punishment merely. Such a doctrine would involve a contradiction of terms as well as principles.

While Woodman v Nottingham 49 N. H.

389 has sometimes been quoted as against the doctrine of punitory damages. the case is interesting as illustrative of a large class of cases in which the doctrine has been entirely misconstrued.

The exact words used are "If the plaintiffs injury is aggravated by the criminal act or neglect of the defendant by evidence, recklessness, insolence, wanton or malicious or oppressive violence and the like, on the part of the defendant, all such conduct should be properly considered in estimating the plaintiffs actual damages."

The point to be emphasized in this class of cases is, that so far as the motive or conduct of the defendant is taken in consideration in estimating damages the said damages are necessarily so

punitory in nature that the term punitory damages is justified.

This point alone, if properly understood would form a sufficient answer to nearly all the arguments against the doctrine of punitory damages as applied in its true signification.

In Voltz v Blackmer 64 N.Y. 440, 444, an action was brought for false imprisonment. J. Andrews delivered the opinion, saying, "In vindictive actions, as they are termed, such as libel, assault and battery, and false imprisonment, the conduct and motive of the defendant is open to inquiry, with a view to the assessment of damages, and if the defendant in commiting the wrong complained of, acted recklessly or wilfully and maliciously, with a design to oppress

and injure the plaintiff, the jury, in fixing the damages, may disregard the rule of compensation" (to be precisely commensurate with the injury, neither more nor less) "and beyond that may as a punishment to the defendant, and as a protection to society against a violation of personal rights, and social order, award such additional damages as in their discretion they think proper."

What is the significance of this decision? Did the learned justice mean that the damages so allowed should be solely and purely for the sake of punishing the offender? The significance of "disregard the rule of compensation" becomes plainly evident when we understand the rule of compensation, as laid down in Greenleaf's "Evidence," to the effect that

it shall be precisely "commensurate with the injury neither more nor less".

"Beyond" this, the jury shall award "additional damages". Would the phrase "additional damages" have been used if the learned justice had intended that the amount should be for the purpose of punishment only?

It is obvious that if such a meaning was really intended there would be no justification in awarding the said amount to the plaintiff.

Perhaps in no case has the true rule been more clearly stated than in Chiles v Drake 2. Metcalf (Ky.) 146.

The question of punitory damages in civil action where an act was also indictable as a crime was directly in question. It was maintained that such

damages could not be allowed, and Chief Justice Simeon, in delivering the opinion, declared the argument to be based upon a misconception of the doctrine of punitory damages. Said he, "the plaintiff is authorized to recover damages for the injury sustained, and those damages are to be vindictive, or in other words, they are punitive. The recovery is for the loss sustained, but the damages to be allowed therefore are to be exemplary. This is the sense in which the word punitive has been frequently used in this court. Vindictive damages are allowed, it is true, by way of punishment, but they are allowed as compensatory for the private injury complained of in the action. They are allowed because the injury has been

increased by the manner in which it was inflicted.

*** Every recovery for personal injury with or without vindictive damages operates in some degree as punishment, but is a redress of private wrong and does not therefore violate either the meaning or spirit of the constitution" that no person shall be punished twice for the same offense.

"The rule, when properly understood, is in our opinion, supported by principle and analogy and has decided preponderence of authority in its favor. The arguments used in opposition to the rule, proceed on the erroneous assumption that vindictive damages are inflicted by way of criminal or penal punishment, and are not given by way of compensation

for the injury complained of."

This learned justice, it seems to me has struck the key note as to the doctrine of punitive damages. They are of double nature as the term implies. The only difference between common or actual damages in actions of this nature, and vindictive damages lies in the fact that one may be called purely compensatory, because it takes cognizance of the injury of the plaintiff only, while the other takes cognizance of the motive of the defendant, and because it does so, is so strongly punitory in its nature, as well as compensatory as to justify the name applied to it.

It is compensatory because the said motive of the defendant in commiting a wrong action, creates a greater or less wrong to an individual. It is punitory in nature

because, so far as it is based upon the intentions of the defendant, it acts as a punishment to him.

Having now come to a clear and concise understanding of the definition and nature of the doctrine, we will now look to its origin.

Chapter II Origin.

(a.) Early Trace of General Principles.

In seeking for early traces of this doctrine in ancient law, some few things should be born in mind.

I. One of the primary and fundamental aims of the law is to provide a full, adequate and complete remedy for every wrong which amounts to a violation of a legal right

II. The intent or motive of a wrongdoer has been directly, or at least indirectly considered, in seeking remedies for a very large class of wrongs.

III. In all wrongs in which the motive of the wrongdoer forms an important part, no remedy is complete which does not take it in cognizance.

IV Any remedy based upon the motive

of the wrongdoer, rather than upon the injury or person injured, could naturally and in accordance with the best principles of logic be called punitory damages.

Whenever, therefore, we find such a remedy, we have found traces of this doctrine. Where the term was not used we should expect to find traces of punitory damages in instances where damages were overwhelmingly excessive.

Natural indignation at the motive which impelled a man to commit an offence would cause a judge or juror to give damages far in excess of actual loss.

Perhaps the most prominent thing to be noticed in earlier ages was the tendency seen in all systems of jurisprudence to arbitrary rules for every species of wrong.

Thus in Jewish Law, we find a curious mixture of punishment and damages, in Exodus ch. XX. ver. 32

"If a manie ox push (gore) a man servant or maid servant, he shall give unto their master thirty shekels of silver, and the ox shall be stoned." Surely the ox would have had good excuse to write a book on Evidence, and to complain of the punitory damages. But again in ch. XXII ver. 9. "For all manner of trespass, whether it be for ox, for ass, for sheep, for raiment, or for any manner of lost thing which another challengeth to be his, the cause of both parties shall come before the judges; and whom the judges shall condemn, he shall pay double unto his neighbor." By speculation at any rate the man might be said to pay double

because it was he who counted the wrong.

Something more than the injury to the one man must have been considered, else why should the man pay double. ch. XXI ver. 35 "If one man's ox hurt another's, so that he die; then they shall sell the live ox and divide the money of it, and the dead ox also shall they divide."

Here there is no evil intent or motive, the loss, if any, shall be born by both. There shall be punishment to neither. (Bible.)

In Hindoo Law, we find the same principle of double recovery. "Where a claim is proved, the person who gains the suit is put in possession, and the judge exacts a fine of equal value from the defendant. And if the plaintiff loses his case, in like manner pays double the sum sued for.

Vol. II, pp. 498, 504 Queen Ackerry by Gladwin. In Roman Law a large discretion seems to have been left to a single judex or juror by the judge.

This judex made special inquiry as to whether the act was accompanied with dolus or culpa lata, that is, fraud, evil design, or gross negligence, and if so, the plaintiff was permitted himself to swear to the amount of the injury sustained { Sedgewick on Damages. p. 2

Here we see a remedy which is based upon the motives of the defendant or guilty person, and in so far as effected by that motive, must be of punitory nature.

The Civil Law seems also to have retained this discretionary nature of the judex in the tribunal. Says Domat, speaking of dommages - interêts indefinite they "are increased or diminished at the

at the discretion of the judge according to the facts and circumstances of the particular case." Loix Civiles. part 1. vol 1, p. 259

Said circumstances in all probability include the motive of the party in fault.

The first trace of these principles in Anglo Saxon jurisprudence and is seen in what is known as Leges Ethelbirhti, and dates from the time of Ethelbert, king of Kent. It is of peculiar interest because it deals almost exclusively with tort actions, the remedy for which consisted of the were, were gildum, or weregild, literally "man money." So far as I can discover this was the earliest form of damages known to English law. In all probability, however, the weregild was originated by the ancient Germans. (Tacitus Man. Ger. c. 21.)

A sum, distinctly punitory in nature, was paid to the injured party or his representatives by the person who had committed an offense heinous in nature, as in the case of homicide etc. (Blackstone, b. 9 2

So much for the early traces of the general principles of this doctrine as seen in the history of the laws of the different nations. We will now consider its origin as seen in the early cases upon the subject.

(b.) Early Cases.

While the first reported case on punitory damages seemed to date from 1763, it must not be considered that an entirely new and distinct rule of damages was formed. As we have seen, traces of its general principles have been present in the law from its earliest for-

mation. One of those traces seemed to be present in the wide discretionary power left to either judge or jury in cases in which fraud, malice, or gross negligence (dolus or culpa lata) were present.

In English law, at and before 1763, this arbitrary and discretionary power was vested in the jury, and it is on this that the principles laid down by Lord Camden, in Huckle v Money, the first authenticated case, seems to be based. (Sedgewick on Damages, pp. 502-4.

In Huckle v Money 2 Wils. 244 an action for trespass, assault, and imprisonment was tried. The plaintiff had been wrongfully arrested as printer of the "North Briton" on a warrant issued by the Secretary of State, and on suit for damages £300 was awarded.

A new trial, on ground of excessive damages was sought, and Lord Camden said "The personal injury done to the plaintiff was very small; so if the jury had been confined by their oath, to consider the mere personal injury only, perhaps £20 would have been thought damages sufficient: but the small injury done to the plaintiff, or the inconsiderableness of his station and rank in life, did not appear to the jury in that striking light; in which the great point of law, touching the liberty of the subject, appeared to them at the trial; they saw a magistrate over all the king's subjects exercising arbitrary power, violating magna Charta, and attempting to destroy the liberty of the kingdom, by insisting upon the legality of this

general warrant before them. They heard the king's counsel, and saw the solicitor of the treasury endeavoring to support and maintain the legality of the warrent in a tyranical and severe manner, these are the ideas which struck the jury on the trial, and I think they have done right in giving exemplary damages. I cannot say what damages I would have given, if I had been the jury, but I directed and told them they were not bound to any certain damages, against the solicitor generals argument."

What is the significance of this decision? Why, that a jury in assessing damages in like cases need not consider the injury to the plaintiff only, but may also consider the conduct of the defend-

ant in committing the offence in giving an adequate remedy for a wrong, and a judgment will not be set aside on the ground that said jury appeare to have taken in consideration the conduct of the defendant, and the circumstances of the case, more than the actual pecuniary damage of the plaintiff.

In Beardmore v Carrington 2 Wils. 244 £1000 was awarded in a similar case in which the plaintiff had been imprisoned only six days. On motion for a new trial, Lord Camden laid down the general doctrine of punitive damages. He said "Damages are designed not only as a satisfaction to the injured person, but likewise as a punishment to the guilty, and as a proof of the detestation in which the

wrongful act is held by the jury."
("Lives of the Chancellors" by Lord Cambell)

While these precise words cannot be found in the Wilsons reports, they are valuable as showing the construction placed upon the decision by Lord Cambell. It is interesting to compare this construction of the doctrine as developed by the two cases, with the modern construction noted in Chiles v Drake, 2 Met. Ky. 146.

Grey v Grant. C. B. Trin. 4 Geo. III (Bayer on Damages) was an action brought for a blow given by one person to another, and the somewhat novel doctrine was laid down, that exemplary damages should be given to prevent duelling. This doctrine was reiterated in Merest v Harvey, 5 Taunt. 442, an

action of trespass quare clausum fregit, in which the defendant trespassed upon the plaintiffs land, fired at the game, and used insulting language.

Heath J. said, "I remember a case where the jury gave £500 damages for merely knocking a man's hat off; and the court refused a new trial. There was not one country gentleman in a hundred who would have behaved with the laudable and dignified coolness which the defendant did. It goes to prevent the practice of duelling if juries are permitted to punish insult by exemplary damages." It is interesting to denote the peculiar significance of this doctrine. Why should exemplary damages stop duelling? Simply because if a remedy was proposed which did

not take in consideration the conduct, motives etc. of the defendant as well as the mere pecuniary damages of the plaintiff, such remedy would be an entirely incomplete, inadequate one, and the parties would be tempted to take the matter in their own hands.

Beare v Lyons 2 Stark. 317 is important as laying down if possible, in still clearer terms the general doctrine. The defendant broke into the plaintiff's close and poisoned some poultry. On the defendants' contention that he was liable only for the price of the fowls, Abbott, J. decided that the jury might not only consider the pecuniary loss of the plaintiff, but also the intention, whether for insult etc. the act was committed, and so to assess damages which would furnish an

adquate remedy for the offence.

Cases might be multiplied in which the doctrine was applied about this period, but it is hardly necessary. The most important inference to be drawn from this study, is that a remedy, which does not take cognizance of the conduct of the defendant as well as the injury of the plaintiff, is not adequate. It was the desire for a complete remedy for wrongs that led to the adoption of doctrine of punitive damages.

Chapter III. Development.

(a.) Different Interpretations.

While the doctrine as set forth in the preceding pages seems to be a simple one, which all persons with a fair degree of intelligence ought to comprehend, certain courts and writers of general authority have insisted upon misinterpreting it. Thus, as has been mentioned before, Greenleaf in his work on "Evidence", has entered into an exhaustive review of authorities, and has argued strenuously against the doctrine, seemingly from an erroneous assumption that punitive damages were for punishment purely and solely. His views seem to be quite generally shared by the extremely few authorities who are against the doctrine. Especially is the view taken up and argued at

length by Foster J. of the New Hampshire Courts. Mr. Greenleaf - Foster J. and the modern Massachusetts Courts seem to take the same view of the doctrine, and hold, as Greenleaf expresses it, that "Damages are merely for the sake of compensation, and should be precisely commensurate with the injury." The ideas of Mr. Greenleaf were advanced in criticism of the general rule of exemplary damages as laid down by Mr. Sedgwick in his work on "Damages."

The controversy which followed has now become a noted event in the history of the law. The ground taken by Sedgwick in general was, that while the strict rule of compensation should prevail in civil actions, in certain tort actions in which gross fraud, malice or oppression appears, the jury are not bound to adhere

to the strict rule of compensation, but may, by a severer verdict, at once impose a punishment on the defendant, and hold him up as an example to the community. Greenleaf on the other hand maintains that the strict rule of compensation should be followed in all civil actions.

Mr. Sedgwick maintains, in strict accordance with logical rules, that the question of fraud or malice, belongs peculiarly to the conduct and motives of the defendant, rather than to the wrong or in injury of the plaintiff, and because the said questions so refers, the remedy based upon it results in punishment, rather than compensation, and should receive a name indicative. Mr. Greenleaf declares that said motive or conduct of the defendant when bad, increases the

wrong done to the plaintiff, and can therefore be fully accounted for, by considering the wrong or injury to the plaintiff only, that is, by adhering to the strict rule of compensation.

It will be seen by examining these two authorities in a careful and critical way, with a clear understanding of terms and the nature of the doctrine, that neither learned writer has defined his position as clearly as he might have done.

Thus, just what did Mr. Sedgwick mean when he said "depart from the strict rule of compensation and award damages which shall be by way of punishment"?

Did he mean for punishment only?

Then surely he should have said so, and instead of using the term "damages" he should have used the word sum or

amount, for "damages" taken apart from vindictive, or alone, has the meaning of compensation, and to say compensation can be given for the sake of punishment only is ridiculous. The significance of the saying really was, 'depart from the strict rule of compensation, and award a compensation which shall operate as a punishment as well.'

Looking at the matter in this light, it seems that either Greenleaf has failed to understand the force of the rule as given by Sedgwick, or that Sedgwick has taken a position that the true significance of his own language will not justify. So also Mr. Greenleaf might have defined his position in a clearer way. Just what does the learned jurist mean when he states that a remedy or

a part of a remedy which is based entirely upon the conduct or motives of the defendant, is for the purpose of compensating the plaintiff only? Does he deny that a remedy so based, whatever it is called, operates as a punishment, that it is clearly of so punitory a nature that the term punitory damages when applied to it, would be justified?

Clearly he does not, but bases his whole argument upon the erroneous assumption, that punitory damages are for punishment only. While I do not deny that punitory damages seem to have been so applied in some cases, such application is simply an abuse of the doctrine, and not the doctrine itself.

Mr. Greenleaf therefore controverts the abuse of a doctrine, and not the doctrine

itself. In doing so he has made an exhaustive review of authorities which Sedgwick had cited in favor of the doctrine. He claims and proves that in no case has there been an express decision upholding punitive damages for the express and sole purpose of punishment.

The fact is brought by Foster, J. in Fay v Parker 53 N. H. 342, in which another exhaustive review of cases has been made. What those cases really hold is, as the name implies, punitive damages for the sake of punishment as well as compensation, or for the sake of compensation as well as punishment.

If the amount so given had been purely or solely for the one purpose or the other, surely a different name would have been adopted. Thus Foster, J. holds

that the remedy given in Huckle v Money and other cases of that period, could have been given for compensation only.

He declares the doctrine in Gaulow v Meilson 4 N. H. 521 to amount to the same thing. This was action for crim. con. and the judge said "the jury may look at the conduct of the defendant in order to determine what a man who had done as he had, ought to pay." Again in Davidson v Goodall 18 N. H. 423 an action for seduction, Foster, J. quotes the judge as saying, "Increased damages are allowed to the plaintiff as compensation for the feelings, and as tending to check the commission of subsequent offences."

These cases illustrate the whole class of cases distinguished and criticised by Judge Foster as not supporting punitory

damages to be used merely for the sake of punishment, and there can be no doubt in the mind of the person who reads Fay v Parker, that the stand is well taken, and substantially proved.

What is not proved however, is the fact, that said damages, simply because they are never for the sake of punishment only, are for the sake of compensation merely. Let me again repeat, emphasize, and declare, the cases cited by Greenleaf and Foster, as not upholding punitive damages for the sake of punishment only, do uphold that doctrine for the sake of punishment and compensation.

The consequence of this seeming misconception of the doctrine taken by Greenleaf and Foster, J. has been seen in

some of the states. Thus, as has been seen before, Massachusetts repudiates the doctrine, seemingly because of this erroneous assumption.

Here however, exactly the same recovery is allowed as given under the doctrine of punitive damages, only it is said to be as compensation to the plaintiff for his injured feelings. Thus in Hawes v Knowles 114 Mass. 518. Gray C. J. lays down the somewhat erroneous doctrine.

"The manifest motive of the wrongful act may be given in evidence as affecting the question of damages, *** it may be aggravated in its effects upon the mind, if it is done in wanton disregard of the rights and feelings of the plaintiff than if it is the result of mere carelessness"

That is, in effect, the plaintiff ought

to have more compensation, because he feels bad that the defendant has been so wicked. This remarkable doctrine was followed in Colorado, in Merkley v Hobbs 7 Col. 541, but the Legislature, composed of practical men, who, though not so learned in the theoretical requirements of the law, still knew how to frame laws to meet the necessary demands of the people, and therefore adopted the true doctrine in the Session Laws of 1889. See Howlett v Tuttle (Col.) 24. P. R. 921.

Nebraska and Michigan seem to follow the Massachusetts doctrine.

Michigan has also abolished capital punishment, but seems at present, the people are becoming dissatisfied with some of her inadequate laws, for according to the latest reports capital

punishment is to be resumed. Rieve v Mc Cormick. 11 Neb. 261. & Wilson v Bowen 64 Mich. 133.

Texas adopts still another rule. In cases of wilful, malicious injuries, exemplary damages are allowed for mental anguish, counsel fees, loss of credit, that is consequential damages, and for wrongful attachment. That is counsel fee and loss of credit, are to be a part of the exemplary damages. I. & G. N. R. R. Co. v Telephone & Telegraph Co. 69 Tex. 277 & Biering v First Nat. Bank 69 Tex. 599.

In Nevada, Wyoming, and West Virginia, damages are divided into determinate and indeterminate, and the latter or those not easily determined, are given for non-pecuniary loss, physical

or mental pain or loss of reputation.

These are called exemplary damages. No damages shall be recovered for punishment only, but exemplary damages (of the nature of punishment) shall be recovered for mental anguish.

Quigley v Central R. R. Co. Nev. 350. Union R. R. Co. v House 1 Wyo. 27. Pegram v Mortey 31 W. Va. 350 & Beale v Thomson, 31 W. Va. 459. Perhaps the most peculiar departure from the general rule is to be seen in the courts of Indiana. Arguing from the same erroneous assumption, that vindictive damages are for the purpose of criminal punishment only, and therefore the same as the fine or penalty in criminal actions. They allow only vindictive damages in offenses not punishable criminally, and this view seems also to have found some support

in some other jurisdiction. The justice of this doctrine will be considered later.
State v Stevens 103 Ind. 55

Having now noticed some of the different views of the doctrine, let us turn our attention to a peculiar phase of its development, that is, the tendency to take extreme views with regard to it.

(b.) Tendency to extremes.

In discussing all questions of this nature, there is a tendency on the part of some to take extreme views. It is therefore no surprise to find such to be the case with regard to punitive damages.

Thus we find an article in the Boston Law Reporter of April 1847, which reads as follows: "There seems to be no reason why a plaintiff should receive greater damages from a defendant who has

intentionally injured him, than from one who has accidentally injured him, his loss being the same in both cases.

It better accords with our natural feelings that the defendant should suffer more in the one case than in the other; but the points of mere sensibility and of mere casuistry are not allowable to operate in judicial tribunals, and if they were so allowed, still it would be difficult to show that a plaintiff ought to receive a compensation beyond his injury.

It would be no less difficult, either on principles of law or ethics, to prove that a defendant ought to pay more than the plaintiff ought to receive. It is impracticable to make moral duties and legal obligations, or moral and legal liabilities coextensive." This article marks the

extreme view of authorities who can find no justification for the doctrine of punitive damages. And though Foster, J. commenting upon it denounces it as "monstrous heresy." I fail to see why, when properly understood it is not about as logical a statement as doctrine against punitive damages, as a doctrine which proposes to make a remedy based upon the motives and intent of one person solely and purely compensatory to another person.

This article in the Reporter marks the one extreme. I know of no court of final jurisdiction which has directly countenanced the other, that is, that punitory damages shall be used solely for the sake of punishment. But the lower court in Fay v Parker, the case in which Foster, J. delivered his celebrated

opinion seems to have taken exactly this ground. The judge's charge to the jury was to the effect that, after fully compensating the plaintiff, they could assess "exemplary damages which would be punitive and not compensatory."

It should have been obvious that this charge was entirely wrong, and it would seem highly unnecessary for the learned opinion advanced to over-rule it. Having marked the two extremes of doctrine as presented in the Reporter and the lower court in the New Hampshire case, it might be able to find a happy medium view which should exactly express the true doctrine. This is discovered in writings of that "master jurist" Kent who having expressly in mind the article in the Boston Law Reporter

and the opinions of Mr. Sedgwick as laid down in his able treatise, says "the conclusions in Mr. Sedgwick's treatise are well warranted by the decisions, and the attempt to exclude all consideration of the malice, and wickedness, and wantonness of the tort in estimating a proper compensation to the victim is an unpracticable visionary and repugnant to just feelings of social sympathy. ** If fraud, malice and mala mens mingle in the controversy, the claim goes beyond absolute compensation and punitive, vindictive or exemplar damages by way of punishment, and for examples sake, seem to be admitted."

The phrase "in estimating a proper compensation to the victim" should be especially noticed and emphasized.

Having now noted some of the

various differences of interpretations given to the doctrine by the courts, and the general tendencies of the discussions thereof, it would, perhaps be interesting to notice some of the specific arguments pro and con as to whether the doctrine is justifiable.

(c.) Discussions pro and con.

Let us look first at the arguments against.

I. Being at variance with the general rule of compensation in civil actions, it is logically wrong.

II. Damages to punish a defendant are unjust, (a) because in civil action offences do not have to be proved beyond a reasonable doubt as in criminal actions; (b.) juries are not the persons to assess said punishment.

III. To punish a wrongdoer in civil action when there is a criminal action for the

same offense, is to put the person twice in jeopardy for the same offense and hence constitutionally wrong.

II. Damages recovered under the rule of exemplary damages can just as well be recovered under the strict rules of compensation.

I. Taking up these arguments in order, the first thing to observe, is that the premise of argument (one stated and implied) are correct, but the conclusion is not warranted by the premises. While it is true, that the remedy, based upon the doctrine of punitives is an exceptional one, to the general rule of compensation in civil actions, it is no less true, that said exceptional remedy is for the express purpose, meting an exceptional offense or wrong. All legal wrongs should have complete and adequate remedies.

And no remedy would be complete in this class of torts, unless based upon substantially the same basis as vindictive damages.

II. Numbers II and III are based upon an erroneous assumption which has already been pointed out and explained. (a) of number I however is answered expressly by the decision in St Ores v. Mc Glashen 74 Cal. 148 in which it was held that circumstances, on which exemplary damages are based, do not have to be proved beyond a reasonable doubt. (b.) As to the jury being allowed too much discretion in fixing the damages, it must be remembered, that verdicts for excessive damages can be set aside by the judge. Then too, it seems that the argument should be urged against the jury system, rather than the doctrine of

punitive damages. As for myself, I believe the jury to be the proper persons to decide such questions, and that they have no more discretion than they should have.

III While we do not for a moment acknowledge that a sum used for compensation to one private person and punishment to another is based upon the same principles as a fine or penalty recovered from a criminal at the suit of the public, suppose for the argument that we do. Can it be possible that intelligent people, supposed to be acquainted with the primary principles of judicial procedure should so confuse the legal rights and relations of the individual and the public to suppose that a civil action for an offence will bar a criminal action for the same offence?

But to make it still stronger and at

the same time to look at it from a different standpoint, suppose that a commits an offense to B and to C by the same transaction, say by gross and intentional malice, drives over them in the street, does any person suppose that he shall not answer fully and adequately to each? Will suit by the one where there is no common interests, bar the suit of the other? Surely the difference between the private and the public wrong is known to all. (Apply to the reasoning in State v Stevens 109 Ind. 55.)

II. Perhaps the strongest argument is the one noted in number four. It is claimed that the same recovery can be "had by the strict rules of compensation". This argument is principally open to objection on the ground that it would be illogical to say that a remedy, or the part of a remedy which is

based solely on the bad intentions of a wrongdoer is simply and only as a compensation to the party injured. As has been mentioned before in the Kentucky case (Chiles v Drake) all damages recovered in actions for personal injuries are to a certain extent punitory in nature: but when the recovery is based solely on the bad motives or intentions of the defendant something inherent in him and apart from the injury itself it is at once seen that said recovery must be very highly punitory in nature, in fact, as much punitory as compensatory. It is much more logical to call things by their true names, than to declare a sum purely compensatory which is as much punitory as compensatory.

Then to base all such recovery on the ground that the plaintiffs feelings have

been wounded, or that the plaintiff feels hurt because the defendant has been wicked is to culminate an absurdity. By far the safer and sounder doctrine is that the wrong for which the recovery is allowed, has been aggravated by the motives or intentions of the defendant, a fact which calls for greater compensation, and so far as said compensation is based upon the motives and intentions of the defendant, it is so strongly punitory, that we will call the said increased compensation punitory damages.

Chapter III. Conclusion.

(a.) How far Applicable.

Before laying down general rules for the application of this doctrine, it will be interesting to note the significance of the term "smart money," used in our courts as synonomous with the term vindictive damages.

Rutherforth first mentions the term and defines it as money paid to a man for pain suffered for personal injuries.

It must be carefully distinguished from the exemplary damages, allowed in early cases. These were given because of the motives and conduct of the defendant and the increased wrong on account thereof to the plaintiff. Smarts for physical injuries furnish the bases for original smart money. Used today as a synonim

of punitive damages, it is plainly misapplied, and should be discontinued. If used at all it should be applied to those actual damages for physical injuries which adhere to the strict rules of compensation. (Ruth. Stat. B. 1 ch. 22. sec. 1.)

In the application of the general doctrine, special stress should be laid on the following:

I. Exemplary damages can never be had unless there is some actual loss.

It would seem that this would follow from the correct understanding of the term, for if it were not so, such damages would be purely for the sake of punishment.

Kleidel v Antlis 71 Ills. 241.

II. Exemplary damages can only be based upon the motives or intentions of the wrongdoer, otherwise such recovery would

not be sufficiently punitory to justify the term. Reeder v Purdy 48 Ills. 261.

III. Exemplary damages cannot be recovered from the personal representatives of the defendant, for such would not be punitory. Sheik v Hobson 64 Ia. 146.

IV. Damages can never be for punishment only. A charge to the jury therefore, that they may give exemplary damages for punishment, and not for compensation is incorrect. the proper words to use "the jury may give exemplary damages by way of punishment as well as compensation." Fay v Parker. 53 N. H. 342.

V Exemplary damages cannot be recovered from the principal for an act of an agent, nor from a master for the act of his servant, unless the malice expressed by the intentions or motives of the

said agent or servant can be attributed to the principal or master. Hedg. vol. pp. 35-8 & notes.

Having now studied the nature origin and development, a few general remarks in addition to the reasons already given, as to the reason why the doctrine is justifiable will not be out of place in concluding this thesis.

(5.) Justification as understood.

I The doctrine is established on the ground of authority. There is practically no english case which directly calls it in question. And though the statement has been made that the courts of this country are in great confusion over the subject, there is hardly a doubt that the doctrine is established beyond all controversy.

It is more than likely that the so called

confusion of the courts, lies more in the inability of the person so alleging to fully understand the doctrine, than in the truth of the matter. In this country it is an established doctrine in the United States courts, and has been sanctioned by nearly every state court in most of which it is still unquestioned law. Story accepts the doctrine as uncontroverted. Boston Man. Co. v Fiske 2 Mason 119.

Kent has written strongly in its favor, as has the most of eminent modern writers. (See authorities collected. Sedg. on Damages vol. 1. 8th ed. pp 523-4.)

II. It seems to me that the rule here been adopted to meet direct needs of society. It should be retained for that reason if for no other. The more general the law, the more injustice, because less adapted

to specific instances, and hence to the demands of the people that society required a remedy to take cognizance of all the circumstances attending the class of torts in which vindictive damages are allowed. ie proved by the fact of its almost universal adoption. So far from being an unwarranted illogical doctrine, destroying the symetry of the law, it is a doctrine fully warranted, nay demanded by society, logical, because in strict accordance with justice, and instead of destroying, adding to said symetry, making it so complete and adequate, that it will take cognizance of specific as well as general requirements of the people.

Finis.